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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 442/O.T. 1966

VOLKSWAGEN INTERAMERICANA, S.A.,
Petitioner,

v.

HENRY E. ROHLSEN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Additional Questions Presented

1. Whether, prior to retrial, a writ of certiorari should be granted to review a case which has been remanded for a new trial on the question of damages, where the issues presented by the petition may become moot upon the possible entry of a judgment adverse to respondent.

2. Whether the Court of Appeals improperly invaded the province of the jury, in violation of the Seventh Amendment to the Constitution, in disturbing the verdict for a supposed error in fact.

Additional Constitutional Provisions Involved

Provisions of the Seventh Amendment to the Constitution of the United States are involved. The Amendment is set out in full on page 1a of the Appendix to this brief.

Statement Of The Case

Respondent accepts petitioner's statement. Necessary additions will be noted in discussion of points raised by petitioner.

Reasons Why Writ Should Not Be Granted

1. Disposition Below Was Not Final.

Trial of this case in the District Court, on the issue of damages, has been set for October 26, 1966 in accordance with the order of the Court of Appeals. A copy of the order setting the case for trial is printed on page 2a of the appendix to this brief.

There is a possibility, however improbable, that the jury will award only nominal or minimal damages. In such instance respondent would lack the necessary financial inducement to respond to petitioner's contentions, should the writ be issued; unless, of course, it should be determined that the basis of the decision of the Court of Appeals reversing the case as to damages, should be reviewed.

2a. The Question Of Whether Or Not Petitioner Is Covered By The Automobile Dealers Act Is Of Insufficient Interest To Warrant Consideration Here.

b. The Question Of Whether Petitioner Was Acting For And Under The Control Of The Manufacturer Is One Of Fact, Determined By The Jury.

a. It is pointed out on page 7 of the petition that automobile distributors, dealing in low-volume lines and foreign cars, are numerically inconsequential.

It is therefore submitted that the issue raised on page 6 of the petition lacks the grave public interest which will warrant consideration and determination by this Court.

b. At the request of petitioner, defendant below, Record Appendix, pages 71-72, requests No. 6 and 7, the trial court charged the jury that to find for plaintiff it must first find that defendant was acting for and under the control of the manufacturer, Record Appendix 1069.

Since this was a factual matter, determined by the jury, it is not reviewable by this Court. *Lavender* v. *Kurn*, 327 U. S. 645; *Atlantic Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U. S. 355; *Gallick* v. *Baltimore and Ohio Railroad Company*, 372 U. S. 108; *Dennis* v. *Denver & Rio Grande Western Railroad Co.*, 375 U. S. 208.

3. The Issue Of "Good Faith" Was One Of Fact Determined By The Jury.

The second point raised by the petition, page 9, merely questions the sufficiency of evidence to support the jury's finding that petitioner did not act in good faith in terminating respondent's franchise.

It was not within the province of the Court of Appeals to reweigh the evidence and it properly refused to do so.

Exercise of the trial court's discretion in acting upon a motion for new trial is not subject to review. *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474; *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150.

4. The District Court Had Jurisdiction Over Defendant.

The Automobile Dealers' Act, 15 U. S. C. 1222 specifically provides that the manufacturer, as defined in the Act, may be sued in any district court in the district in which the manufacturer "has an agent".

In addition to the facts recited by the Court of Appeals as supporting its conclusion that petitioner exercised direct control over Volkswagen de Puerto Rico, Inc. (petitioner's appendix B, 3b), through whose manager defendant was served with process, it also appears from the record (Record Appendix 156, paragraph 15) that, in its contract with respondent, petitioner specifically provided that Volkswagen de Puerto Rico, Inc., "has been appointed the official representative of Volkswagen (petitioner) and that from time to time upon instructions from Volkswagen the Distributor (respondent) will be visited to check his operations, make recommendations, etc."

There was no evidence submitted to indicate that this agency was ever terminated.

The record also reflects that when Sam Doyle was loaned to respondent in order to assist him, he was in the employ of Volkswagen de Puerto Rico, Inc. but his salary was charged to respondent, "to the inter-company account" (Record Appendix 412).

Facts establishing respondent's contacts with the Commonwealth of Puerto Rico and Volkswagen de Puerto Rico, Inc. are sufficient to justify the determination of the District Court and the Court of Appeals that the District Court had jurisdiction.

5. Constitutionality Of The Acts.

In its third point petitioner challenges the constitutionality of the Automobile Dealers' Act.

The instant case appears to be the only one in which a court of appeals has determined the constitutional issue.

It remains only to determine whether or not the constitutionality of the Act presents a question of such importance that it should be settled by this Court.

Admittedly, doubt has been cast upon the constitutional validity of the Act by recognized respected authorities as pointed out in petitioner's brief, page 12. It is possible that this doubt accounts in some measure for the lack of success sustained in courts of appeal by automobile dealers whose cases, brought under the Act, have reached those courts.

If it is considered that the decision of the Court of Appeals dealing with the constitutional question (appendix to petition, pp. 13b-15b) is sufficient to resolve the doubt in favor of the validity of the Act, then determination by this Court is unnecessary.

6. Respondent Established Damages By Competent Proof.

In its fourth point, page 15, petitioner contends that respondent failed to present any legally sufficient evidence of damage and for this reason judgment should have been entered by the Court of Appeals for defendant below.

Without attempting to recite all of the items of damage which were proved, it should be sufficient answer to this argument to show that in one instance alone respondent lost the profits from the sale of twenty-five automobiles which had been ordered by the Hertz representative in St. Croix. The order was firm, being accompanied with a deposit of $5,000. This loss was attributable solely to the unexplained failure and refusal of petitioner to honor respondent's order for vehicles with which to fill the Hertz order (Record Appendix, 480, 492, 508, 576-578, 705, 871-873).

This loss of profits is not affected by respondent's operating overhead. As pointed out by respondent in his testimony (Record Appendix, 493) he had to continue operation even though he had no cars to sell.

Even if petitioner should be correct in its assertion that evidence of damage was insufficient, the peremptory entry of judgment for defendant would have deprived plaintiff of the right to take a nonsuit as discussed in *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U. S. 248, 217, cited by petitioner, page 19.

7. If The Petition Is Granted, The Error Of The Court Of Appeal In Reversing On The Question Of Damages, For Supposed Error Of Fact, Should Be Considered.

The first of the two so-called "substantial errors" (appendix to petition, 16b) assigned by the Court of Appeals is "the court's error in permitting the jury to find that if plaintiff had received the last 117 cars he had ordered (for only 25 of which he had firm orders from customers), his profit on all 117 would have been the same

as the gross mark-up. Manifestly there would have been some expense, even if all had ultimately been sold."

How the trial court should have prevented the jury from making such a finding if, in fact, it did, or how the Court of Appeals arrived at its determination that the jury did not consider petitioner's expense in determining his damages, if in fact this is one of the items of damage upon which the award was made, is not clear.

Plaintiff was subjected to rigorous cross-examination in relation to his damages, especially concerning his gross and net profit (Record Appendix 698-699, 703-711). The jury could not have been unmindful of the fact that any expenses arising out of sales of vehicles would necessarily be considered in determining loss of profit.

If the manifest expense mentioned by the Court is meant to include petitioner's operational overhead, it is submitted that this would be incorrect since, as pointed out above, this expense continued whether petitioner was furnished cars or not.

True, the trial court refused to give defendant's requested charge No. 14(b) as stated (Record Appendix 74, 1030-1032). "In determining loss of profits, you may only take into account the reasonable net profits, not the mark-up, on cars for which plaintiff had confirmed orders as of August 31, 1962."

This requested charge was clearly too restrictive. The trial court did charge that, in computing damages the jury might consider loss of profits from sales which plaintiff had effected or was unable to complete because of the action of defendant. The jury was also instructed that damages must be reasonable and such as will fairly and reasonably compensate plaintiff and that they must not be speculative (Record Appendix 1069, 1072).

It is submitted that the Court of Appeals made a direct finding of fact that expenses were involved in the sale of automobiles and, by inference, that this finding is contrary to that of the jury. In so doing the Court invaded the province of the jury in violation of the Seventh Amendment to the Constitution as interpreted by this Court in the cases cited in sections 2b and 3 above and in *Berry* v. *United States*, 312 U. S. 451.

The other "substantial" error assigned for reversal was the trial court's refusal "to charge on plaintiff's duty to mitigate the damages which plaintiff claimed for being left with" useless parts and inventory "when defendant had expressly offered to take" this material off his hands.

The expressed offer mentioned in the opinion is that stated in the letter of purported termination, plaintiff's Exhibit 19 (Record Appendix 198); in which it is stated,

> "Naturally we will try to help you to dispose of your present inventory of cars, parts, tools, literature, etc., i.e. to transfer same to the new Volkswagen dealer on the island. Please forward to us detailed specifications of your inventory, as well as the corresponding prices, so that we can try to find a satisfactory solution for all parties concerned."

Petitioner testified that at the time of purported termination he had $21,000 worth of spare Volkswagen parts. Without objection he stated that no one had offered to take them off his hands. He had to continue to service his customers' cars until June, 1963 when Tropical Motors was ready to commence operations and reduced his inventory to $13,000. He did not furnish the requested inventory (Record Appendix 498-499, 712).

Defendant's requested charge No. 14(c) (Record Appendix 74) reads:

> "You may not attribute any damages either to the alleged accumulation of an inventory of parts, or to tools and equipment, since plaintiff did not avail himself of defendant's offer to purchase same."

Objection to the charge on the ground that it was a comment on the evidence was sustained (Record Appendix 1030-1031). No corrected charge was requested.

In view of the damages found by the jury in the amount of $300,000 it would appear that the trial court's failure to charge regarding this item, if error at all, was insignificant and harmless.

In seizing upon it for a ground of reversal it would appear that the Court adopted the suggestion of Judge Sibley in *Home Ins. Co.* v. *Tydal Co.*, 152 F. 2d 309, 311, that, "The most an appellate court can do, if it thinks the verdict not according to the weight of the evidence, is to scan the trial more closely for error. * * *."

Whether or not defendant's offer was in fact bona fide was a question for the jury to determine.

Other supposed errors were evidently considered not to be substantial.

As to the trial court's liberality in receiving plaintiff's testimony regarding figures concerning profits, and the suggestion that defendant might avail itself of an opportunity to take plaintiff's deposition in St. Croix (appendix to petition 17b), it should be noted that exhaustive depositions consisting of three volumes had been taken of plaintiff prior to trial and were filed by defendant at the outset of the trial (Record Appendix 369). Also three boxes of plaintiff's business records were produced and made available to the defense (Record Appendix 593, 713-714).

The Court next finds fault with plaintiff's "self-evaluation" of his franchise.

The plaintiff was entitled to testify as to his estimate of the value of his franchise and it was for the jury to determine the weight and credit to be given such testimony. 3 *Wigmore,* 3d Ed. secs. 712, 714, 716; *Universal Picture Co.* v. *Harold Lloyd Corp.,* 162 F. 2d 354.

Finally the Court found no basis in the Dealers' Act for allowing plaintiff to recover damages to his business reputation.

All that the Act says is that the dealer "shall recover the damages by him sustained", 15 U. S. C. 1222.

Testimony reflects that termination of plaintiff's franchise made him a "laughing stock of the community"; that his inability to fill orders lead to the belief that plaintiff had failed to send orders for cars; that he was fooling his customers, and was unreliable, and "not a good person to do business with." Also, his credit standing in the community was seriously impaired.

This would appear to be a damage sustained by plaintiff as a result of defendant's wrongful act. The fact that such damages are difficult to ascertain and are uncertain should not be reason for eliminating them.

This Court said in *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 265,

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."

Further in the case, quoting from *Story Parchment Co.* v. *Parchment Paper Co.,* 282 U. S. 555, it is said:

> "'The constant tendency of the courts is to find some way in which damages can be awarded where

a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights."

Conclusion

For reasons above stated, the petition for a writ of certiorari should be denied or, if granted, should be limited to the question pertaining to the constitutional validity of the Automobile Dealers' Act and to the propriety of the order of the Circuit Court of Appeals for the First Circuit reversing the cause as to damages and remanding the cause for a new trial on the question of damages.

Respectfully submitted,

JOHN D. MARSH,
Attorney for Respondent.

Amendment VII—Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Notice of Trial

UNITED STATES DISTRICT COURT

FOR THE
DISTRICT OF PUERTO RICO

Civil No. 176-63

HENRY ROHLSEN

v.

VOLKSWAGEN INTERAMERICANA S.A.

TAKE NOTICE that the above-entitled case has been set for trial at San Juan, P. R., on October 26, 1966, at 9:30 A.M.

Date August 25, 1966

CARMEN A. CARRERAS,
Clerk.